

Avoiding or Defeating Potential Antitrust and Other Civil Suits Relating to Anti-Price Gouging Laws

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I. Introduction

Social and economic upheavals can generate legal risk. Thus, it should not be surprising that antitrust and unfair competition claims, as well as a variety of other putative class actions, are starting to materialize in the wake of the enormous disruptions created by the COVID-19 pandemic.

In particular, demand for certain consumer goods has skyrocketed, while supply chains have struggled to keep up and prices—as would be expected—have been volatile. Some of the products experiencing these issues include face masks, hand sanitizer, and staple grocery items, but as disruptions from COVID-19 ripple through the economy, other products may well suffer similar effects. In the meantime, states and the federal government have increased enforcement of laws targeting “price gouging” and “hoarding,” and consumers have filed lawsuits alleging that firms ranging from manufacturers to distributors to resellers have engaged in conduct of this sort, such as the price gouging suit brought against Albertsons on June 3.

This memorandum explains possible antitrust and litigation risks facing firms that participate in the consumer goods supply chain marketplace, particularly in light of recent price gouging laws and lawsuits.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or any of our partners listed under [Antitrust](#) in the “Our Practice” section of our website.

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II. Legal Landscape

Other than the relatively narrow Defense Production Act (discussed below), there is no federal anti-price gouging law, and antitrust laws do not provide a cause of action against price gouging.¹ However, as of June 3, 2020, nearly every state either has a law specifically targeting price gouging (some put in action due to emergency declarations, such as California,² and others recently enacted entirely, such as Maryland)³ or has announced that it will enforce price gouging through laws that prohibit “unfair business practices” more generally. There is no single definition of price gouging under state laws. Many states, such as New Jersey⁴ and Oklahoma,⁵ use a 10% increase from previous prices as the relevant threshold. Others states, like Florida,⁶ rely on more vague qualitative language, such as prices that “grossly” exceed the average.

¹ A summary of recent price gouging laws, including their European counterpart “abuse of dominance,” was provided in our [alert memo](#) on March 31, 2020.

² *FAQs on Price Gouging*, CALIFORNIA OFFICE OF THE ATTORNEY GEN., available at: <https://oag.ca.gov/consumers/pricegougingduringdisasters#3C>.

³ *Governor Hogan Enacts Emergency Legislation to Enhance Ongoing Response to COVID-19*, OFFICE OF GOVERNOR OF MARYLAND (Mar. 19, 2020), available at: <https://governor.maryland.gov/2020/03/19/governor-hogan-enacts-emergency-legislation-to-enhance-ongoing-response-to-covid-19>.

⁴ *AG Grewal on Price-Gouging: Stop, or Face Consequences*, NEW JERSEY OFFICE OF THE ATTORNEY GEN. (Mar. 17, 2020), available at: <https://www.nj.gov/oag/newsreleases20/pr20200317a.html>.

⁵ *Attorney General Hunter Announces Price Gouging Statute in Effect Statewide Following Federal Emergency Declaration Regarding COVID-19*, OKLAHOMA ATTORNEY GEN. (Mar. 13, 2020), available at: <http://www.oag.ok.gov/attorney-general-hunter-announces-price-gouging-statute-in-effect-statewide-following-federal-emergency-declaration-regarding-covid-19>.

State laws also vary with regard to what products and services are covered.

Price gouging laws can put firms in a difficult position. Price increases are often necessary to respond to changes in costs, including raw materials and labor, and consumer demand. Especially in uncertain times, the ability to flexibly respond to changes in cost can be imperative for a firm to survive and essential for efficiently allocating scarce resources.⁷ At the same time, attempts to avoid the risk of attracting price gouging lawsuits could conflict with other federal and state antitrust provisions.

In particular, risks facing manufacturers and distributors have increased in recent weeks. Initial lawsuits targeting price increases focused on individuals—some of whom were public in their attempts to take advantage of uncertainty⁸—

⁶ *Price Gouging Frequently Asked Questions*, FLORIDA OFFICE OF THE ATTORNEY GEN., available at: <https://myfloridalegal.com/pages.nsf/Main/5D2710E379EAD6BC85256F03006AA2C5?OpenDocument>.

⁷ For example, even where firms have not yet experienced increased costs or constrained supply, where they can see those problems looming in the near future, increasing prices can limit runs on products, reduce hoarding, and prevent unnecessary shortages (thus, it is possible that sharp price increases in the face of COVID-19 would have kept toilet paper and paper towels on store shelves, instead of stockpiled in the attics and basements of the consumers who were the first to go on panicked buying sprees). Similarly, short-term price increases can attract new supplies into affected markets; for example, increases in the market prices of gasoline, water, and generators after hurricanes frequently result in enterprising businesses and even individuals bringing those goods into the affected markets much more quickly than would be the case if prices were prevented from rising. *See, e.g.*, FEDERAL TRADE COMMISSION, *FTC INVESTIGATION OF GASOLINE PRICE MANIPULATION AND POST-KATRINA GASOLINE PRICE INCREASES* (May 23, 2006), available at: https://www.ftc.gov/system/files/documents/public_statements/572331/060523gasolineprices.pdf.

⁸ *See, e.g.*, Jack Nicas, *He Has 17,700 Bottles of Hand Sanitizer and Nowhere to Sell Them*, N.Y. TIMES (Mar. 14,

hoarding essential products to later sell at high prices.⁹ More recently, however, state AGs and consumers have turned to large manufacturers and distributors of essential services, such as food producers and grocery stores. Three recent cases, one brought by the Texas Attorney General and two by consumers in California, highlight the risk price gouging laws can create for large firms, including those increasing prices out of necessity.

III. Recent Lawsuits

a. *Redmond v. Albertsons Cos., Inc.*

On June 3, 2020, a plaintiff brought suit on behalf of herself and all similarly situated individuals against Albertsons Companies, alleging the defendant grocery store chain violated California’s Unfair Competition Law (“UCL”) by raising prices on certain essential goods. Specifically, the plaintiff alleges these increases violate California’s price gouging statute—and therefore the UCL—which prohibits the sale of covered goods at prices “10 percent greater” than the prices charged “immediately prior to the proclamation or declaration of emergency” unless the defendant can prove the increase was the direct result of increased costs.¹⁰ The plaintiff seeks to certify two classes—one in California and one nationwide—of individuals who bought

exorbitantly priced items from Albertsons-owned stores during the pandemic. The plaintiff seeks compensatory damages and equitable relief.

b. *Fraser v. Cal-Maine Foods*

Redmond is only the latest in a growing number of class action suits alleging price gouging in the current pandemic. On April 20, 2020, a group of plaintiffs sued producers, wholesalers, and retailers of eggs, alleging that at least some of the group engaged in price gouging, in violation of the UCL.¹¹ The group of defendants includes Cal-Maine, but also companies such as Costco and Whole Foods. The plaintiffs seek restitution for every person in California, measured by the difference between the price prior to the emergency and the price paid.

The plaintiffs allege as support for their claims that it is an “undeniable fact that egg prices nearly tripled” after California Governor Newsom’s emergency declaration.¹² Because, plaintiffs allege, the price of eggs rose “more than 180% during the COVID-19 emergency, it is clear that some or all of the defendants have raised their prices to an extent that violates the law.”¹³

California consumers are not alone. Other class actions have been filed against egg producers in Texas,¹⁴ against Amazon in California,¹⁵ and

2020), available at: <https://www.nytimes.com/2020/03/14/technology/coronavirus-purell-wipes-amazon-sellers.html>.

⁹ See, e.g., *Attorney General Files Price Gouging Lawsuit Against Online Seller*, ALASKA DEP’T. OF LAW (Apr. 1, 2020), available at:

<http://www.law.state.ak.us/press/releases/2020/040120-Aune.html>; Neil Vigdor, *A Hoarder’s Huge Stockpile of Masks and Gloves Will Now Go to Doctors and Nurses*, F.B.I. SAYS, N.Y. TIMES (Apr. 2, 2020), available at: <https://www.nytimes.com/2020/04/02/nyregion/brooklyn-coronavirus-price-gouging.html>.

¹⁰ Complaint at ¶ 41, *Redmond v. Albertsons Cos., Inc.*, No. 3:2020cv03692 (N.D. Cal. June 3, 2020).

¹¹ Complaint, *Fraser v. Cal-Maine Foods, Inc.*, No. 3:20-cv-02733 (N.D. Cal. Apr. 20, 2020).

¹² *Id.* at ¶ 7.

¹³ *Id.* at ¶ 53.

¹⁴ Nicole Stuessy, *Class-Action Filed Against Cal-Maine Foods, on Top of AG Paxton’s Price-Gouging Lawsuit*, KVUE (Apr. 23, 2020), available at:

<https://www.kvue.com/article/news/local/texas/texas-attorney-general-lawsuit-price-gouging-eggs-cal-maine-foods/269-847decab-c88f-42ed-9c2f-e74cca6f3c8b>

¹⁵ *Amazon Accused of Price-Gouging in CA Class-Action Suit*, COMPETITION POLICY INT’L. (Apr. 23, 2020),

against a healthcare company in Washington State.¹⁶

c. *Texas v. Cal-Maine Foods, Inc.*

In addition to consumer-led class actions, firms should also anticipate government enforcement of price gouging laws. On April 23, 2020, the Texas AG filed a complaint against Cal-Maine Foods and its subsidiary Wharton County Foods, accusing the companies of “selling eggs at an exorbitant or excessive price during a disaster,” in violation of Texas’s price gouging law, and seeking an injunction and civil penalties of up to \$10,000 per violation, or \$250,000 in the event the deception “impacts anyone over 65 years of age.”¹⁷ The lawsuit represents a significant departure from prior actions brought by attorneys general over price increases, which had generally been focused on individuals hoarding essential goods for resale, often without producers’ knowledge or ability to prevent, or against third-party platforms serving as a location for the resale of hoarded goods.

Texas is not alone in targeting price increases made by firms instead of individuals, and in expanding the scope of products and services targeted. The North Carolina attorney general

<https://www.competitionpolicyinternational.com/amazon-accused-of-price-gouging-in-ca-class-action-suit/>

¹⁶ Mary Anne Pazanowski, *Envision Hit With Proposed Class Action Over Price Gouging*, BLOOMBERG LAW (May 7, 2020), available at:

<https://news.bloomberglaw.com/health-law-and-business/envision-hit-with-proposed-class-action-over-price-gouging>.

¹⁷ Complaint at ¶ 55, *Texas v. Cal-Maine Foods, Inc.*, No. 202025427 (215th Dist. Ct. Harris Cty. Tex. Apr. 23, 2020).

¹⁸ *Attorney General Josh Stein Gets Temporary Restraining Order Against Alleged COVID-19 Price Gouger*, NORTH CAROLINA DEP’T. OF JUSTICE (May 5, 2020), available at: <https://ncdoj.gov/attorney-general-josh-stein-takes-legal-action-against-alleged-covid-19-price-gouger>.

filed suit against a towing company for improper booting and towing of vehicles carrying essential goods,¹⁸ and attorneys general in Washington D.C.¹⁹ and New York²⁰ have each filed complaints against convenience and drug stores. These enforcement actions indicate the seriousness with which the government is taking alleged price gouging and other conduct related to the pandemic, and the importance of considering these risks. Firms should anticipate other states acting similarly.

IV. Other Enforcement Actions and Lawsuits

The federal government has also indicated a willingness to increase enforcement, with the opening of a new COVID-19 complaint form and hotline for consumers to report hoarding of essential goods,²¹ including fraud relating to price gouging. The Justice Department issued its first charge under Section 102 of the Defense Production Act, which permits the President to prohibit price gouging with respect to scarce materials, charging an individual in Long Island for hoarding personal protective equipment “for the purpose of resale at prices in excess of

¹⁹ *AG Racine Files First Price Gouging Lawsuit Against Ward 7 Convenience Store*, OFFICE OF THE ATTORNEY GEN. OF THE DIST. OF COLUMBIA (May 4, 2020), available at: <https://oag.dc.gov/sites/default/files/2020-05/Helen-Mart-Complaint.pdf>.

²⁰ *Mayor de Blasio and Commissioner Salas Prosecute Repeat Price Gougers*, N.Y. CITY GOV. (Apr. 8, 2020), available at: <https://www1.nyc.gov/office-of-the-mayor/news/240-20/mayor-de-blasio-commissioner-salas-prosecute-repeat-price-gougers>.

²¹ *NCDF Disaster Complaint Form*, U.S. DEP’T. OF JUSTICE, available at: <https://www.justice.gov/disaster-fraud/ncdf-disaster-complaint-form> (last updated May 6, 2020).²² Complaint at 1, *United States v. Singh*, No. 20-MJ-326 (E.D.N.Y. Apr. 24, 2020).

prevailing market prices.”²² Meanwhile, in the Senate, Senators Jerry Moran (R-Kan.) and Richard Blumenthal (D-Conn.), who lead the Senate Commerce Manufacturing, Trade and Consumer Protection Subcommittee, have called on the FTC—which normally does not investigate price gouging—to provide guidelines as to when price gouging might rise to an enforcement action.²³

V. Best Practices

Times of crisis create uncertainty, and uncertainty generates risk. The rapid increase in enforcement demonstrates the seriousness with which State AGs are taking price gouging. The rise in consumer lawsuits only adds to the frustration and risk. Moreover, in some states price gouging and similar laws are not only available to individual consumers, but businesses can also be “consumers” and have standing to sue, expanding the potential risk. With best practices, however, this risk is manageable.

a. Best Practices for All Firms

Assume laws targeting price increases exist. Firms should assume any state in which they operate has laws against price gouging, or an attorney general willing to enforce broader consumer protection laws against price increases, and should bear in mind that given the unprecedented nature of this crisis, agencies may not consider themselves shackled by previous cases.

Assume laws targeting price increases apply to a broad set of goods. Attention has shifted from medical products to food and basic consumer

goods and services. Though in many states, price gouging laws are product-specific, in general, consumer protection laws are not. Of course, goods likely to be viewed as particularly important right now—cleaning supplies, personal protective devices such as masks and gloves, paper goods, and staple food items—likely present the highest risk.

Act cautiously, but appropriately, in managing supply shortages. Many state laws provide safe harbors to protect manufacturers and distributors who experience supply shortages. Allowing a product to run out could risk reputational damage, while raising prices to prevent shortages risks violating price gouging laws. In lieu of price increases to manage demand, firms should feel comfortable implementing reasonable quantity limitations or implementing objective pricing measures that respond to demand, such as requiring that all pricing changes be specifically matched to demonstrable cost increases, or auctions.

Remember: appropriate price increases are low risk. Small, reasonable changes in price in direct response to changes in cost are low risk. Small changes in the price of purely non-essential goods in response to changes in demand, particularly if firms follow pricing mechanisms normally used and if the changes in demand are neither significant nor connected to Covid-19, are also likely low risk. Documenting cost changes and past practices helps minimize this low risk even further.

²² Complaint at 1, *United States v. Singh*, No. 20-MJ-326 (E.D.N.Y. Apr. 24, 2020).

²³ *Sens. Moran, Blumenthal Seek Answers from FTC on Price Gouging Amid COVID-19: Senators Believe FTC Has A Duty to Protect Consumers From Bad Actors During*

Pandemic, SEN. JERRY MORAN: NEWS RELEASES (Apr. 16, 2020), available at: <https://www.moran.senate.gov/public/index.cfm/2020/4/sen-s-moran-blumenthal-seek-answers-from-ftc-on-price-gouging-amid-covid-19>.

b. Manufacturers

Document cost changes. Firms should carefully document changes in input costs, including complying with new labor and safety regulations. Integrated producers should note that state AGs might consider their positions relatively stable compared to other producers.²⁴ Firms already facing necessary price increases prior to emergency declarations should consider reviewing these price increases and documenting their reasons, regardless of whether those increases were due to the pandemic.²⁵

Document contractual obligations. Firms that might need to increase prices contractually should document this requirement, and might consider evaluating long-term contracts for such provisions.²⁶

Document reasons for pricing changes. Firms should document and consider explaining the need to change prices, including pricing contracts. If price increases are necessary, consider gradual price movements that reflect underlying market conditions, rather than sudden increases.

Consider state-specific antitrust laws against resale price maintenance. A number of manufacturers have chosen to prohibit their customers (distributors or retailers) from raising the prices of the manufacturers' goods. While this is an obvious and intuitive response to the risk of price gouging, it is important to keep antitrust law in mind when considering such a step. Imposing restrictions on the prices others charge for your products—so-called “resale price maintenance”—has long raised antitrust concerns. While resale

price maintenance is no longer *per se* illegal except in a handful of states, it can still be subject to antitrust scrutiny. Thus, it is generally wise to impose price restrictions—for example, prohibiting sharp price increases by distributors or retailers—on a unilateral basis, rather than by agreement with those distributors or retailers. In other words, if you choose to prohibit your distributors or retailers from raising prices, do so by announcing a policy to that effect—for example, that you will terminate any retailer that raises prices for your products—not by negotiating any such rule or entering into a contract to that effect.

c. Distributors

In addition to the best practices for manufacturers, distributors might take note of the following.

Avoid market allocation and output limitation agreements. It is still illegal to horizontally divide a market among distributors or agree to limit output. Market allocation and output limitation agreements should be avoided (absent specific antitrust immunity, such as that available in limited circumstances under the DPA). Consider circulating Antitrust Dos and Don'ts to individuals at the firm responsible for pricing or corresponding with competitors.

Document changes in pricing methodology. Making significant changes to prices could be risky, particularly for goods and services experiencing increases in demand due to COVID-19. Making changes to pricing methods that lead to significant price increases, such as switching from a national index to an internal methodology,

²⁴ See Complaint at ¶ 27, *Texas v. Cal-Maine Foods, Inc.*, No. 202025427 (215th Dist. Ct. Harris Cty. Tex. Apr. 23, 2020) (alleging that, because Cal-Maine is an “integrated producer,” its egg supply, production, and distribution costs have remained stable).

²⁵ See *id.* at ¶ 31 (alleging that Cal-Maine's pricing was “normal” prior to the COVID-19 pandemic).

²⁶ See *id.* at ¶¶ 28-29.

also creates risk unless well documented. Consider the need to make these changes and, if necessary, consider using objective criteria or processes and engaging with antitrust authorities before doing so.

d. Resellers

In addition to the best practices for manufacturers and distributors, resellers might take note of some additional considerations, particularly those that sell consumer goods.

Avoid “unusual” price increases. With intense focus on price increases, firms should take care to avoid increases that might seem unusual to consumers. For example, as proof of alleged price gouging, the Texas AG complaint points to the fact that generic egg prices had risen so substantially that they exceeded the price of specialty (and limited availability) brands.²⁷ Firms should note that attorneys general (and consumers) might be on the lookout for what they perceive to be unusual pricing, such as large price increases, even if it is simply a reflection of ordinary methods.

Be alert to and consider “unusual” purchasing quantities. While increases in demand necessitate increasing purchasing, distributors and resellers should take note of the increase in cases targeting hoarding. Firms should take some comfort from the fact that the cases targeting hoarding so far have generally targeted individuals who deliberately purchased large quantities to resell on the third market for significant markup. Provided that sales are not accompanied by significant increases in price, purchasing goods ahead of time to ensure supply is continuous is low risk. Consider tying purchases to demand, but take care

for products where demand is increasing rapidly or changing daily. Where demand is increasing rapidly, consider tying future purchases to daily demand, investor expectations, or other documentable indicators to show that the purpose of the purchases was to be able to meet expected demand, not to keep product off the market to increase prices.

Monitor pricing algorithms. Pricing algorithms that respond automatically to changes in consumer demand could lead to substantial price increases. Resellers should carefully monitor these algorithms, particularly those with little human oversight, and consider installing automatic shut-offs to avoid price spikes.

Monitor state-specific law. Retailers should note that laws vary significantly. For example, New York law makes it illegal to increase prices by 10% or more on any personal or household good that is needed to prevent or limit the spread of COVID-19. There is an exception, however, for price increases driven by cost increases as long as the price increase is comparable to the cost increase.²⁸

Be cautious about collaborating in implementing safety procedures. Safety, obviously, is of paramount importance, and there should be wide latitude for legitimate efforts to improve customer and employee safety. It has become increasingly common for retailers, such as grocery stores, to implement certain safety measures, such as total shopper limits and restricted shopping hours. Implementing such measures when required by government, or on a purely unilateral basis, should not raise any antitrust risk. However, coordinating with direct competitors on safety

²⁷ *Id.* at ¶¶ 36.

²⁸ See *Price Gouging Is Illegal for Any Item or Service Needed to Limit the Spread of COVID-19*, N.Y.C.

CONSUMER AFFAIRS (Mar. 27, 2020), available at: <https://www1.nyc.gov/site/dca/media/Face-Masks-in-Short-Supply-Due-to-COVID-19.page>.

measures that also have the effect of reducing output—for example, car dealers or office supply stores coordinating directly with other local car dealers or office supply stores on limiting operating hours—could create antitrust risk. Consider circulating Antitrust Dos and Don'ts to employees at the firm responsible for these policies, who may not have previously received such advice. We also recommend consulting with counsel concerning any coordination with competitors on these issues.

VI. Other Antitrust Laws and Best Practices

Antitrust law does not traditionally apply to allegations of price gouging, particularly where no other anticompetitive conduct is alleged. As we indicated above, unsurprisingly, therefore, some price gouging laws may be in tension with other areas of established antitrust law, particularly resale price maintenance, market allocation and output limitation, and state laws against below-cost selling. The following provides a more detailed discussion of these issues for those with possible concerns in this area.

a. Resale Price Maintenance

Laws targeting price increases can conflict with established precedent concerning resale price maintenance.

Although minimum and maximum resale price maintenance is no longer *per se* illegal under federal law, requiring distributors or resellers to

sell at certain prices—particularly prohibiting them from *reducing* prices—can be actionable under the Rule of Reason. Under *Leegin Creative Leather Products v. PSKS, Inc.*,²⁹ courts focus on the net effect of price maintenance (including the number of manufacturers engaged in the practice and whether the restraint is requested by retailers or by the manufacturer) and market power. Significant market power, retailer-driven adoption of the practice, or many competitors participating in the maintenance can lead to increased scrutiny. Firms should note that an explicit agreement is not required to constitute resale price maintenance, even under the Rule of Reason and after *United States v. Colgate & Co.*, which created limited leniency around resale price maintenance.³⁰ In certain states, including Maryland,³¹ California,³² and New York,³³ resale price maintenance is arguably still illegal *per se*. Where the *per se* rule applies, courts would not focus on whether any agreement between a producer and distributor existed, and not on the net effect of price maintenance.

Maximum resale price maintenance—in other words, prohibiting your distributors or resellers from *raising* the price of goods—has rarely been challenged since the Supreme Court held in *State Oil v. Khan*³⁴ that there was “insufficient economic justification” for *per se* treatment. It can still be challenged under the Rule of Reason, where the elements would likely be similar to those under minimum price maintenance.

²⁹ 551 U.S. 877 (2007).

³⁰ 250 U.S. 300 (1919).

³¹ Md. Code Ann., Com. Law § 11-204(b) (“For purposes of subsection (a)(1) of this section, a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce.”)

³² See *California v. Bioelements Inc.*, No. 10011659 (Cal. Super., filed Jan. 11, 2011) (finding a plaintiff can establish a *per se* violation merely by proving that particular acts occurred).

³³ See *Antitrust Enforcement*, N.Y. ATTORNEY GEN., available at: <https://ag.ny.gov/antitrust/antitrust-enforcement>

³⁴ 522 U.S. 3, 4 (1997).

Price gouging laws can encourage behavior that might run afoul of these price maintenance restrictions, particularly in Maryland, California, and New York. For example, Maryland’s recently enacted price gouging law prohibits raising the price of certain consumer goods and services that would increase the seller’s profit by more than 10% while the COVID-19 emergency declaration is in effect.³⁵ At the same time, Maryland’s resale price maintenance statute prohibits any resale price maintenance that does not “result from the purely unilateral decision of a manufacturer, without negotiation as to its terms, and must be enforced unilaterally.”³⁶ Thus, a resale price maintenance requirement from a manufacturer that raises a retailer’s profit by more than 10% could violate the price gouging law, but negotiating for a price maintenance requirement for that specific retailer could violate the resale price maintenance prohibition.

It is unlikely that Maryland’s new price gouging statute is the only instance of potential conflict between the price gouging statute and preexisting laws. Consulting counsel prior to implementing changes in pricing policy can help minimize risk. Other best practices include making pricing decisions unilaterally and independently.

b. Market Allocation and Output Limitation

Price increases can often allow firms to minimize hoarding and allocate scarce resources. In the face of price gouging statutes, however, firms should not resort to other methods of allocation. Market allocation and output restriction

³⁵ See *Price Gouging Is Illegal: Report It*, MARYLAND ATTORNEY GEN., available at: https://www.marylandattorneygeneral.gov/Pages/CPD/price_gouging_faq.aspx

agreements are *per se* illegal and criminally actionable. Firms should not agree with competitors to any market allocation, even if that allocation would allow a distributor to more efficiently allocate resources. Firms, especially retailers, limiting purchases of high-demand products should make the decision to implement such limits independently. If, however, governmental agencies require or encourage such activity, there are possible protections against antitrust liability. These, however, are technical and limited, and you should consult counsel before participating in any such activity, even if government is involved.

c. State Laws Against Below-Cost Selling

Particularly in times of unpredictable costs, firms should be aware that several states have laws against below-cost selling. At the federal level, below-cost selling is only illegal where there is also a substantial probability of success of monopolization and no likelihood of market entry that would prevent recouping losses, but some state laws only require the below-cost pricing be “with the intent and purpose of driving out competition or for the purpose of financially injuring competitors.”³⁷

Laws against below-cost selling may conflict with laws against price increases. While most laws against price increases provide a safe haven for increases in costs, and some laws against below-cost selling exclude certain essential goods or other clearance-type situations, with costs increasing rapidly in some industries, firms should take care when setting prices at or potentially

³⁶ Complaint at ¶ 17, *Maryland v. Johnson & Johnson Vision Care, Inc.*, 03-C-16-002271 (Md. Cir. Ct. Feb. 29, 2016).

³⁷ Ark. Code Ann. § 4-75-310; *see also* Cal. Bus. & Prof. Code § 17043 (“for the purpose of injuring competitors or destroying competition”).

below cost. Firms should note that in some states, advertisements are used as evidence of intent to harm competition. In many states, there is insufficient case law under either the price gouging statute, below-cost statute, or both to determine how the state courts or attorney general would handle a claim involving both laws. Consulting counsel prior to implementing changes in pricing policy can help minimize risk. Other best practices include documenting costs and pricing changes carefully.

VII. Conclusion

In conclusion, we expect price gouging to be an area of agency and state attention. Firms producing or distributing goods in sensitive sectors may want to mitigate this risk, including by, among other things, carefully considering significant pricing deviations, documenting the reasons for new pricing decisions, using objective criteria (such as auctions or specifically linking prices to costs) to manage limited supply or significant demand, circulating antitrust guidelines to employees, and consulting counsel or relevant agencies when necessary. Of course, we stand ready to help with any points of difficulty at this time.

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